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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EMILIO BADILLO, Defendant and Appellant.	B205547 (Los Angeles County Super. Ct. No. BA298295)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed as modified.

Law Offices of Fred Browne and Fred Browne for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Emilio Badillo (appellant) of second degree murder of a fetus (count 1; Pen. Code, § 187, subd. (a)),[1] attempted murder of his wife (count 2; §§ 664/187, subd. (a)); attempted murder of his daughter (count 3; §§ 664/187, subd. (a)), and child abuse (count 4; § 273a, subd. (a)). As to count 2, the jury found true allegations that appellant committed the attempted murder of his wife willfully, deliberately, and with premeditation (§ 664, subd. (a)), and that he personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). As to count 3, the jury found true the allegation that appellant personally inflicted great bodily injury on a child under the age of five years (§ 12022.7, subd. (d)).

The trial court sentenced appellant to an indeterminate life sentence for the second degree murder of the fetus; an indeterminate life sentence for the premeditated attempted murder of his wife plus five years for the great bodily injury enhancement; the midterm of seven years for the attempted murder of his daughter plus five years for the great bodily injury enhancement; and the midterm of four years for the child abuse, which was stayed pursuant to section 654.

On appeal, appellant contends: (1) substantial evidence does not support the convictions of premeditated attempted murder of his wife (who was pregnant at the time), attempted murder of his daughter, and second degree murder of the fetus; (2) the trial court committed reversible error by not instructing the jury on the offense of involuntary manslaughter of a fetus; and (3) the prosecutor committed prejudicial misconduct during her closing argument. The People contend the trial court should have sentenced appellant to a term of 15 years to life on the second degree murder count instead of an indeterminate life sentence.

We agree that appellant should have received a term of 15 years to life on the second degree murder count. We affirm the judgment in all other respects.

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[1] All subsequent statutory references are to the Penal Code unless otherwise specified.

FACTS

I. The Prosecution

A. Perez's Testimony

F. Perez (Perez) was appellant's common-law wife. They have two daughters, J.B. and I.B. Perez learned that she was pregnant in 2006 and told appellant about the pregnancy.

In early February 2006, appellant began asking Perez for forgiveness. Perez did not understand why appellant sought her forgiveness because he had not hurt her in any way. Around the same time, appellant began feeling nervous and depressed. Despite these feelings, however, appellant was happy about having a third child. On February 18, 2006, appellant saw a physician because he had been unable to sleep the week before. The physician prescribed to appellant the medication Xanax and directed appellant to take one pill per night. That night, appellant took two pills.

On February 19, 2006, appellant, Perez, I.B. (age two at the time), and Elvira Silva (Silva), a neighbor, drove to casinos in Morongo and San Manuel. Perez and I.B. stayed outside while appellant and Silva gambled. On the way back to Los Angeles on the westbound 10 freeway, appellant, who was driving, complained that he had a severe headache. Silva urged him to pull over until the headache subsided, but appellant continued driving because he believed they were almost home. Some minutes later, as part of the 10 freeway merged into another freeway, appellant collided with some trashcans filled with sand that stood in front of the freeway divider. No one was injured as a result of the collision. Appellant wanted to continue driving home, but Silva believed it was dangerous for him to do so and took the car keys.

Silva exited the car, crossed some lanes of traffic, and began walking down the shoulder lane of the Soto/Marengo Street on-ramp to the freeway. Appellant, Perez, and I.B. followed. According to Perez, cars entering the on-ramp came very close to them as they walked on the shoulder lane. Appellant appeared nervous and frightened, and was

holding his head and shaking. Appellant suddenly pushed Perez, who was carrying I.B. in her arms. The push caused Perez to drop I.B. over the guardrail and to the ground below. Perez yelled out: "Emilio, the little girl." It looked to Perez as though appellant did not hear her and that "he [wasn't] there at that moment." As Perez clutched the guardrail, appellant pushed her again, causing her to fall over the guardrail and to the ground below. At trial, Perez estimated that the vertical distance between the on-ramp and the spot on the ground where she fell was 10 feet.

Perez, who was in great pain, began searching for I.B. She could not find I.B. and her next memory was of waking in a hospital room sometime later. As a result of the fall, Perez broke her wrists and lost her two front teeth. After Perez was discharged from the hospital, she required assistance with eating and getting dressed. I.B. suffered a leg fracture that required her to wear a cast for two months.

At trial, Perez testified that she did not want the prosecution of appellant to continue because in her view, appellant "wasn't well" at the time he pushed her and I.B. According to Perez, during her seven-year relationship with appellant, appellant had never harmed or threatened to harm her in anyway. Perez also testified that sometime after February 19, a "government employee," such as a police officer or social worker, threatened to take her daughters away unless she directed fault against appellant.

B. Silva's Testimony

Silva testified that as she was walking on the shoulder lane of the on-ramp, traffic was light and she could recall only one car that drove past her. When Silva was approximately 40 feet ahead of appellant, Perez, and I.B., she heard Perez scream, "Emilio, don't push me." She did not hear appellant say anything in response. Silva turned around and saw Perez fall over the guardrail head first. Believing that appellant was "crazy" and that he would push her over the guardrail as well, Silva began running away from him. She ran to a nearby gas station and called the police from there.

Silva testified that she had lived with Perez and appellant for a month, she did not see any conflict between the two during that time.

C. Law Enforcement Testimony

Los Angeles Police Department (LAPD) Officer Karla Barraza arrived at the scene shortly after the paramedics responded. Believing that the situation was merely a traffic collision, Officer Barraza asked appellant, who was holding I.B. at the time, to tell her what transpired. Appellant responded: "That's my wife. She fell over the freeway." Appellant explained that he was attempting to grab I.B. from Perez and that as he reached for I.B., both Perez and I.B. accidentally fell over the guardrail. When Officer Barraza asked appellant where Perez fell exactly, he could not answer. He eventually pointed to an area of the on-ramp where the vertical distance between the on-ramp and the dirt below was a few feet. After permitting appellant to leave, Officer Barraza and her partner surveyed the ground below the on-ramp. At one spot, she found blood, a shoe, a doll, and a diaper bag. The vertical distance from that spot to the on-ramp above was 34 feet. Officer Barraza testified that there was sufficient lighting to see that it was a "far drop" from the on-ramp to the ground below.

Later that evening, after Officer Barraza had interviewed Silva, she detained appellant and read him his *Miranda*[2] rights, which appellant waived. According to Officer Barraza, appellant began crying as he spoke to her and told her that he was depressed and on medication for the depression. Appellant told Officer Barraza that as he was driving home from the casinos, he could no longer stand the depression and so he let go of the steering wheel, causing the car to crash. Appellant also told Officer Barraza that as he, Perez, and I.B. were walking on the on-ramp, he felt the urge to push his wife and child off the ramp. He acted on this urge and pushed them over the guardrail. After appellant pushed them, he ran to the area below the on-ramp and said to Perez: "Kill me. Kill me. Do something. Throw rocks at me. Do something for what I did." Perez responded: "No, hold the baby. I'm going for help."

LAPD Officer Susana Salinaz testified that she, along with another officer, interviewed Perez on February 22, 2006, when Perez was still in the hospital. Perez

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2 *Miranda v. Arizona* (1966) 384 U.S. 436.

appeared alert and oriented to Salinaz during the interview, which lasted for over an hour and was recorded on tape. During the interview, Perez told the officers that appellant was depressed about having a third child and she feared appellant would return and harm her and her two daughters. Perez also told the officers that appellant had expressed jealously in the past and that in May 2005, appellant accused Perez of having an affair with appellant's brother.[3] Perez believed appellant's jealously issues had been resolved because she had talked to appellant and recommended that he obtain counseling. Perez told the officers that as she and appellant were walking on the on-ramp, appellant pushed her, which caused her to drop I.B. over the guardrail. Perez heard I.B. crying and said to appellant: "Don't push me." Appellant pushed her a second time, which caused her to go over the guardrail.[4] Officer Salinaz testified that at no point during the interview did she or the other officer threaten to take Perez's daughters from her.

D. Medical and Injury Testimony

Los Angeles Fire Department firefighter Lewis Dooley was one of the first responders to the scene at the on-ramp. Dooley testified that when he first saw Perez, there was blood on her face.

David Whiteman, deputy medical examiner for the Los Angeles County Department of Coroner, testified that Perez's uterus expelled the fetus on February 22, 2006 at 1:37 a.m. The fetus was stillborn. Dr. Whiteman, who conducted an autopsy on the fetus, testified that the fetus was 22 to 23 weeks old and died from an abruption of the

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3 The interview took place in Spanish and Officer Salinaz acted as the interpreter. During the interview, Perez told Officer Salinaz that appellant accused Perez of having an affair with appellant's brother during the "most recent" May. Because the interview took place in February 2006, Officer Salinaz understood Perez's comment as referring to May 2005.

4 At trial, Perez either denied or could not recall making many of the statements recorded during the interview. She explained that during the interview, she was on several painkillers and was "half-asleep and half-awake."

placenta, which in turn was caused by blunt force trauma to the mother. Dr. Whiteman opined that a pregnant woman falling from a vertical distance of 34 feet and landing on a hard surface could cause an abruption of the placenta.

II. The Defense

Juan Ramirez, appellant's friend of 14 years, described appellant as a peaceful person. Ramirez testified that he never once observed appellant threaten or harm Perez or their two daughters.

Matias Badillo (Matias), appellant's brother, described appellant as quiet and hardworking.[5] Appellant had worked for Matias in Matias's gardening business for 14 years and during that time, appellant kept his family happy and well-dressed. Matias had never seen appellant physically abuse Perez.

DISCUSSION

I. Sufficiency of Evidence—Attempted Murders of Perez and I.B.

A. Appellant's Contentions

Appellant contends substantial evidence does not support the attempted murder convictions because there was insufficient evidence that appellant harbored a specific intent to kill Perez and I.B. Appellant further contends that there was insufficient evidence to support the jury's finding that the attempted murder of Perez was premeditated and deliberate.

B. Relevant Authority

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623 (*Lee*).) "'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Although reasonable minds may differ as to whether a defendant had the intent to

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[5] Because Matias Badillo and appellant share the same last name, we will refer to the former by his first name.

kill, "[o]ur role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the [jury]." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

"In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: '[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] The United States Supreme Court has held: '[T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] . . . . The California Supreme Court has held, 'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citations.]" (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430.)

Given this court's limited role on appeal, appellant bears a heavy burden in claiming there was insufficient evidence to sustain the findings. If the findings are supported by substantial evidence, we must give due deference to the jury's findings and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The standard for securing a reversal is just as high when the prosecution's case depends on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) As long as there is reasonable justification for the findings made by the trier of fact, a reviewing court's opinion that contrary findings might also have been reasonable does not require a reversal. (*Id.* at p. 793.)

C. Analysis

After reviewing the entire record, we conclude that there is sufficient evidence of appellant's specific intent to kill both I.B. and Perez.

We turn first to the attempted murder of I.B. Here, there was evidence that as Perez was carrying I.B. and walking next to the guardrail, appellant pushed Perez with enough force so that I.B. went over the guardrail and onto the ground 34 feet below. The lighting was sufficient for appellant to see that the vertical distance between the off-ramp and the ground below was significant. Appellant, as I.B.'s father, knew that she was only two years old at the time and thus physically vulnerable to such a dramatic fall. From this evidence, the jury could reasonably conclude that appellant harbored the specific intent to kill I.B. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1208 [defendants assaulted victim, placed him in a car, and pushed the car over a cliff; "the individual conduct of both defendants was clearly designed to kill [the victim] and dispose of his body"]; *People v. Robinson* (1970) 6 Cal.App.3d 448, 456 ["An assault with intent to commit murder can be accomplished without the use of any weapon, as, for example, if A pushes B off a cliff with the intent to kill him"]; accord, *People v. Cummins* (2005) 127 Cal.App.4th 667, 677 [affirming conviction of attempted murder where defendant aided and abetted in pushing victim off cliff].)

We turn next to the attempted murder of Perez. After I.B. fell to the ground, Perez clung to the guardrail and pleaded with appellant "Don't push me." At this point, appellant had the opportunity to pull Perez back to safety. Appellant, however, pushed Perez a second time causing her to fall to the ground below. This was certainly sufficient evidence from which the jury could conclude that appellant harbored a specific intent to kill Perez.

We further conclude that there was sufficient evidence of premeditation and deliberation. Premeditation and deliberation may be shown by circumstantial evidence. (*People v. Anderson* (1968) 70 Cal.2d 15, 25 (*Anderson*).) *Anderson* identified three types of evidence significant to the issue of premeditation and deliberation, as follows:

"(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson*, *supra*, at pp. 26–27.)

We note that the *Anderson* factors are simply categories of evidence to be used as a framework in the analysis of the sufficiency of the evidence of premeditation and deliberation. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1081.) In *People v. Perez* (1992) 2 Cal.4th 1117, 1125, the Supreme Court emphasized that these factors are not the exclusive means of showing premeditation and deliberation.

Following the *Anderson* guidelines set forth above, we conclude there was sufficient evidence from which the jury could reasonably infer that the attempted murder of Perez was premeditated and deliberate. First, although appellant claims that the "pushing was indeed hastily executed and rash," the evidence shows that appellant engaged in activity specifically directed toward killing Perez. He pushed Perez as she clung for safety and after she pleaded with him not to push her, and while the only other potential witness to his actions was walking 40 feet in front of them. Second, there was evidence that appellant believed Perez had an adulterous affair with appellant's brother, a belief which provided ample motive for him to kill Perez. Third, the evidence showed that appellant chose to push Perez off the ramp at a point where the vertical drop was

considerable enough to cause death. Even after the first push, when appellant had the opportunity to prevent Perez from falling over the guardrail, he chose not to assist her and instead delivered a second final push.

Appellant points us to evidence that he was depressed, sleep deprived, and on newly prescribed medication, and argues that this evidence showed he could not have formed the requisite mental state to commit attempted murder.[6] The jury, however, was entitled to disregard this evidence in favor of the evidence discussed above. "Our role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the [jury]." (*People v. Lashley*, *supra*, 1 Cal.App.4th at p. 946.) For these reasons, we conclude sufficient evidence supports the jury's findings that appellant harbored the specific intent to kill I.B. and Perez, and that he acted with premeditation and deliberation when he attempted to kill Perez.

II. Sufficiency of Evidence—Second Degree Murder of the Fetus

A. Appellant's Contention

Appellant contends that substantial evidence does not support the jury's finding that he committed second degree murder of the fetus that Perez was carrying because there was insufficient evidence of implied malice.

B. Relevant Authority

"Murder is the unlawful killing of . . . a fetus, with malice aforethought." (§187, subd. (a).) "'[V]iability is not an element of fetal homicide under section 187, subdivision (a),' but the state must demonstrate 'that the fetus has progressed beyond the embryonic stage of seven to eight weeks.' (*People v. Davis* (1994) 7 Cal.4th 797, 814–815.)" (*People v. Taylor* (2004) 32 Cal.4th 863, 867 (*Taylor*).)

'"Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature."

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6 In several passing comments, appellant observes that the trial court did not instruct on involuntary intoxication. To be clear, appellant does not raise this as a ground for reversal and thus we need not address it.

(§ 188.) It is implied . . . "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life" [citation]. For convenience, we shall refer to this mental state as "conscious disregard for life."'" (*Taylor, supra*, 32 Cal.4th at p. 867, fn. omitted.) '"[I]mplied malice has both a physical and a mental component, the physical component being the performance '"of an act, the natural consequences of which are dangerous to life,"' and the mental component being the requirement that the defendant '"knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life."'" (*Id.* at p. 868.)

"There is no requirement the defendant specifically know of the existence of each victim." (*Taylor, supra*, 32 Cal.4th at p. 868.) Thus, in the context of fetal murder, a defendant need not specifically intend to kill the fetus. If a defendant murders a woman who is pregnant with a fetus beyond the embryonic stage, the defendant is guilty of second degree murder of the fetus even if he did not know the woman was pregnant. (*Ibid.;* [defendant was guilty of second degree murder of a fetus when he shot victim in the head not knowing victim was pregnant with an 11-to-13-week old fetus].)

C. Analysis

Appellant claims that even though there was sufficient evidence of an intentional act, the natural consequences of which were dangerous to life, there was insufficient evidence "that appellant knew his conduct endangered life and acted with disregard for that life." This argument finds no support in the record. There was evidence that appellant believed Perez had an adulterous affair with appellant's brother and that some time after that, Perez became pregnant. There was also evidence that appellant was "depressed" about the pregnancy. Finally, there was evidence that appellant intentionally pushed Perez off a precipice where there was sufficient lighting to see that it was a "far drop" to the ground below. From this evidence, the jury could reasonably conclude that appellant acted with a conscious disregard for life when he pushed Perez.

Appellant's additional argument that the trial court erred by denying his motion under section 1118.1 is likewise without merit.[7] According to appellant, at the time the trial court denied the motion, there was no evidence of the fetus's age or cause of death. But this is because appellant made the motion *before* the medical examiner had the opportunity to testify about the fetus's age and cause of death, and *before* the prosecution closed its case. Thus, the motion was improper in the first place and in any event, properly denied because there was evidence of the fetus's age and cause of death by the time the prosecution closed its case.

III. Alleged Instructional Error

A. Appellant's Contention

Appellant contends the trial court erred by not instructing the jury with CALCRIM No. 580, the instruction for involuntary manslaughter. This error, appellant contends, deprived him of his constitutional rights to due process and a fair trial.

B. Relevant Authority

It is well established that "the unlawful killing of a human being, or a fetus, with malice aforethought is murder, but only the unlawful killing of a human being can constitute manslaughter." (*People v. Dennis* (1998) 17 Cal.4th 468, 506.) "There is no crime in California of manslaughter of a fetus." (*Ibid*.; see also *People v. Brown* (1995) 35 Cal.App.4th 1585, 1592 [the offense of fetal manslaughter does not exist under California law]; *People v. Carlson* (1974) 37 Cal.App.3d at 349, 355 [same].) In *People v. Dennis* the Supreme Court rejected a similar challenge brought by a defendant charged with fetal murder and held that he was not entitled to a manslaughter instruction because there was no offense of fetal manslaughter. (*People v. Dennis, supra,* at pp. 505–508)

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[7] Section 1118.1 provides in relevant part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

C. Analysis

Appellant acknowledges that the established law is against the position he has taken on appeal. He urges this Court, however, to make an exception because "[t]he facts . . . in this case were unique in the world of fetal murder cases since they lacked the malice usually associated with that charge." As we understand appellant's argument, the act of pushing his pregnant wife off a 34-foot-high precipice even as she clung to the guardrail and pleaded for him not to push her is somehow less malicious than other acts of fetal homicide documented in prior cases. We reject such an argument as specious and conclude that the trial court properly refused to give an instruction on manslaughter in this case.

IV. Alleged Prosecutorial Misconduct

A. Appellant's Contention

During her rebuttal argument, the district attorney argued to the jury: "If you believe that this case—that I am prosecuting Mr. Badillo, fabricating or mistreating evidence, trying to sway you because of his race, you should call Mr. Steve Cooley at 210 West Temple Street in downtown Los Angeles and report me for unethical conduct." Appellant contends this comment, which he did not object to below, amounted to prejudicial misconduct.

B. Relevant Authority

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment

of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Even assuming prosecutorial misconduct occurred, reversal is not required unless the defendant can show that it is reasonably probable he would have obtained a result more favorable in the absence of the misconduct. (*People v. Arias* (1996) 13 Cal.4th 92, 161; see also *People v. Sanders* (1995) 11 Cal.4th 475, 526 [prosecutorial remarks are misconduct only if there is a reasonable likelihood the jury will improperly misconstrue or misapply the remarks].)

C. Analysis

Appellant concedes that he did not object to the prosecutor's comment when it was made but maintains that "no objection and admonition would have cured the harm from this comment." Appellant provides no further elaboration and we can discern nothing in the record to suggest that an objection would have been futile. The trial court had not ruled on a similar issue during trial and thus showed no predisposition to rule in favor of the prosecution had an objection been raised. In fact, the trial court sustained an unrelated objection made by defense counsel during the prosecutor's closing and, by all appearances, seemed willing to consider additional objections by the defense. Thus, appellant has forfeited this issue on appeal. For the sake of argument, however, we proceed to the merits of appellant's claim.

We begin with some context. During the prosecution's closing argument, the district attorney argued to the jury that appellant intended to kill Perez, I.B., and the fetus. She argued to the jury that Perez had motivation to lie at trial about what transpired on the night of February 19th given her financial dependence on appellant, her inability to speak English, and her young age. The prosecutor urged the jury to believe Perez's statements in the hospital, appellant's confession to Officer Barraza, and Silva's account of what transpired on that night.

Defense counsel began his argument by focusing on appellant's mental state and whether the prosecution met its burden of proving specific intent. Defense counsel then

moved to the issue of motive and argued: "None of the reasons that the D.A. provided you make any common or practical sense to say 'Here's a motive,' but they need something. They got to hang onto something here. They got to get a hook in. They don't have one with respect to this man and his character." Defense counsel continued to argue how he found it "insulting" that an "excellent" and "professional" prosecutor would suggest that appellant wanted to kill the child to save money.

From this context, it is clear that the district attorney's subsequent comment to the jurors urging them to report her for unethical conduct if they believed she was wrongly prosecuting appellant was in direct response to the defense's insinuations that she was fabricating a motive simply to win a conviction. It is well settled that rebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel (see *People v. McDaniel* (1976) 16 Cal.3d 156, 177), and that is all the district attorney did here.

Moreover, the district attorney's comment did not amount to improper vouching. "The general rule is that improper vouching for the strength of the prosecution's case '"involves an attempt to bolster a witness by reference to facts outside the record.'" (*People v. Williams* (1997) 16 Cal.4th 153, 257.)" (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) "Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." (*Ibid*.) "It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence." (*Ibid*.) That is precisely what occurred here. The district attorney set forth a version of what transpired on February 19, which included various motives for the charged offenses, and urged the jury to believe her version of the events. As part of this argument, she told the jury that if it believed the defense's version and also believed that she fabricated motives in order to secure a conviction, then it should report her for unethical conduct. This was not improper vouching and there was no misconduct.

V. Sentencing Error

A. The People's Contention

The People argue that the trial court erred by imposing an indeterminate life sentence for the second degree murder count.

B. Relevant Authority

Section 190, subdivision (a) provides in relevant part: "Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life."

C. Analysis

Section 190, subdivisions (b) and (c) pertain to the murder of a peace officer, and subdivision (d) pertains to murder by means of shooting a firearm from a motor vehicle. Because this case does not involve either scenario, subdivision (a) applies and thus, the trial court should have sentenced appellant to a term of 15 years to life.

DISPOSITION

The judgment is modified to impose a term of 15 years to life for the jury's conviction of second degree murder (count 1). As modified, the judgment is affirmed.

The superior court shall direct its clerk to amend the abstract of judgment to reflect this modification. The superior court shall send the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMMAN-GERST

_____, J.

CHAVEZ